



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Sovereignty Frames and Sovereignty Claims

Citation for published version:

Walker, N 2013 'Sovereignty Frames and Sovereignty Claims' University of Edinburgh, School of Law, Working Papers.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

©Walker, N. (2013). Sovereignty Frames and Sovereignty Claims. University of Edinburgh, School of Law, Working Papers.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



University of Edinburgh

School of Law

Research Paper Series

No 2013/14

Sovereignty Frames and Sovereignty Claims

Prof Neil Walker

Regius Professor of Public Law and the Law of Nature and Nations

University of Edinburgh, School of Law

neil.walker@ed.ac.uk

to be published in Richard Rawlings, Peter Leyland & Alison Young, eds, Sovereignty in Question (Oxford University Press, forthcoming)



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2013 Neil Walker

Edinburgh School of Law Research Paper Series

University of Edinburgh

Abstract

This essay argues that much of the contemporary confusion and controversy over the meaning and continuing utility of the concept of sovereignty stems from a failure to distinguish between sovereignty as a deep framing device for making sense of the modern legal and political word on the one hand, and the particular claims which are made on behalf of particular institutions, agencies, rules or other entities to possess sovereign authority on the other. The essay begins by providing a basic account of the difference between sovereignty as framing and sovereignty as claiming, setting out how, during the ascendancy of the modern state, the stability of the former is contrasted with the fluidity of the latter. It continues by analyzing why and how our understandings and uses of sovereignty have altered in the contemporary wave of globalization, with the very framing significance of sovereignty thrown into doubt. The essay argues, against that scepticism, for the continuing significance of the sovereignty frame in the global age. It concludes with some thoughts about the distinctive ways in which the evolving state of sovereignty framing and claiming plays out in the specific context of the United Kingdom and its external and internal legal and constitutional relations today. The resilient centrality of the doctrine of Parliamentary sovereignty tends to collapse the distinction between the sovereignty frame and the sovereignty claim in the UK context, with certain reductive consequences for the structure and focus of constitutional debate in the UK.

Keywords

sovereignty, speech act, European Union, Parliamentary sovereignty, post-sovereignty, external sovereignty

Sovereignty Frames and Sovereignty Claims

Neil Walker

1. Introduction

Why are we constantly “questioning sovereignty”?¹ Why are we inclined to accuse sovereignty of “hypocrisy”² or to reduce it to a “game”?³ Why are we concerned to “relocate”⁴ sovereignty or to search for its “fragments”?⁵ Why do we consider sovereignty to be “in transition”⁶, perhaps even in “in crisis”?⁷ Why do we feel ourselves in such danger of losing focus on sovereignty that we must strive, as in the present volume, to keep it ‘in perspective’? Frankly, if sovereignty is such trouble and if sovereignty is in such trouble – so incoherent, so illusory, so recondite, so degraded, so superannuated, so dispersed and diffuse – then why bother with it?

¹ N. MacCormick, *Questioning Sovereignty* (Oxford: OUP, 1999).

² S. Krasner, *Sovereignty: Organized Hypocrisy* (Stanford: Stanford University Press, 1999).

³ R. Adler-Nissen and T. Gammeltoft-Hansen (eds) *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (New York: Palgrave, 2008).

⁴ N. Walker (ed) *Relocating Sovereignty* (Aldershot: Dartmouth, 2006).

⁵ H. Kalmo and Q. Skinner (eds) *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: CUP, 2010).

⁶ N. Walker (ed) *Sovereignty in Transition* (Oxford: Hart, 2003).

⁷ J. Fischer, “Europe’s Sovereignty Crisis” *Social Europe Journal*; 02/08/11 <http://www.social-europe.eu/2011/08/europes-sovereignty-crisis/>

The reason, I believe, is actually quite straightforward, though its detailed explanation quickly becomes quite complicated. Sovereignty has long held a dual significance in legal thought. It has been part of the deep and often taken-for-granted conceptual structure through which law is authorised and organized as law and in terms of which we are able to conceive of legal order in general. Yet it has also been the label invoked by, attributed to, or claimed on behalf of a wide range of different actors, entities and mechanisms associated with the legal and political architecture of the state and of inter-state relations. That is to say, sovereignty has inhabited both the silent (and relatively still) depths and the vocal (and relatively volatile) surfaces of legal thought. It has supplied a stable *frame* through which the legal world as a whole is apprehended and shaped⁸ as well as the discursive form of a *claim* variously and sometimes speculatively or contentiously made in respect of a state, a federal province, a nation, a people, a supra-state, a constitution, a constitutive rule or rule-set, a governmental complex or a specific institution of government or governance.

Sovereignty, therefore, has always been a concept as fundamental as it is contentious, as difficult to give up as it is to pin down. Today, however, there is something of a shift in both registers of sovereignty – in sovereignty as frame as well as sovereignty as claim. In each case this shift is associated with the gradual decentring of the state within the global matrix of legal and political authority. On the one hand, as the basic idea of sovereignty has been closely bound up with the form of the modern state, it is unsurprising that the challenge posed by the forces of globalization to the dominant centrality of the modern state form has also led to greater questioning of sovereignty even at the level of deep structure. On the other hand, the more

⁸ See e.g. R. Jackson, "Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape" (1999) 67 *Political Studies* 431-456.

diverse and densely interconnected institutional and regulatory architecture of a less state-centred world also challenges our understanding - already less settled and more fragile at this level - of where and how, if at all, specific sovereignty claims may be persuasively articulated and vindicated.

Sovereignty as frame and sovereignty as claim alike, therefore, occupy a more precarious position today than they did in the period of high political modernity ushered in by the late 18th century constitutional settlements in the United States and France. But it is hardly a more marginal position, for the very factors that challenge the centrality or appropriateness of the sovereignty paradigm also provide the occasion for its re-emphasis. If sovereignty is one of the very building blocks of modern legal thought and organization, then it cannot lightly be discarded; its vulnerability, therefore, is as likely to provoke efforts towards its reassertion or refinement as towards its abandonment. Equally, the increasing fluidity and interconnectedness of governmental relations, which challenges particular claims to sovereignty and complicates their assessment, also provides a fertile field for new claims to sovereignty or the refinement of old claims. The very factors that make sovereignty an increasingly troubled and troubling concept, in other words, also serve to intensify efforts and to extend opportunities to resort to it.

In what follows, I begin by providing a basic account of the difference between sovereignty as framing and sovereignty as claiming, setting out how, during the ascendancy of the modern state, the stability of the former has contrasted with the fluidity of the latter. I continue by analyzing why and how this has changed in the contemporary wave of globalization. I conclude with some brief remarks about the distinctive ways in which the evolving state of sovereignty framing and claiming plays out in the specific context of the United Kingdom and of

its external and internal legal and constitutional relations today. How do 'sovereignty as frame' and 'sovereignty as claim' continue to structure the British constitution, for better or for worse?

2. The Sovereignty Frame

Our modern notion of sovereignty derives from the medieval figure of the sovereign - the ruler who holds absolute authority over his subjects and who is under no legal obligation to any higher power.⁹ The figure of the sovereign already involved a process of abstraction - the King possessing a 'politic body or capacity' in addition to his 'natural body'.¹⁰ Gradually, as the early modern sovereign sought or acquired more extensive and more intensive resources and responsibilities of government, the abstract quality of the office became more pronounced. Both the ruler and the ruled became more formalized and detached categories. Sovereignty came to acquire its mature sense, referring to the existence of a singular ruling power, however institutionalized and internally differentiated, in which inheres final and absolute authority over the political community as a whole. Sovereignty thus understood as an ideal of indivisible but impersonal authority, as developed by early modern thinkers such as Grotius, Bodin and Hobbes, resolved two key problems that had confounded mediaeval political theory. Authority no longer needed to be concentrated in the hands of the one or the few in order to be considered a unity. Equally, its separation from a particular personage or personal office allowed for its continuity over space and time.¹¹

⁹ See e.g. M.Loughlin *Foundations of Public Law* (Oxford: OUP, 2010) ch.7.

¹⁰ *Calvin's case* (1608) 7 Co Rep 1 10a, *per* Coke CJ.

¹¹ See e.g. J. Bertelson "On the Indivisibility of Sovereignty" (2011) 2(2) *Republics of Letters. A Journal for the Study of Knowledge, Politics and the Arts* <http://arcade.stanford.edu/journals/rofl/articles/on-indivisibility-sovereignty-by-jens-bartelson>

The development of this more encompassing conception of sovereignty also begins to account for sovereignty's Janus-faced quality in the modern order – its simultaneous reference to the internal relations of the state polity and to its external relations. Let us recall that, as distinct from the overlapping and interlocking pattern of authority among dynastically sovereign, imperial, clerical, feudal and other forms that was characteristic of mediaeval authority, modern sovereignty denotes the finality, comprehensive remit and indivisibility of the ruling power within a territory. It follows that modern sovereignty's interior and exterior dimensions become closely mutually conditioned and enabled. For the monopolistic authority of a state within its territory to be achieved and maintained, recognition from other polities and their commitment to non-interference was necessary. Equally, for states to exercise their external sovereignty as actors capable of entering into international legal commitments, the indivisibility and finality of their internal authority was required.¹²

How might we summarize the significance of this profound shift from pre-modern to modern understandings of sovereign authority? In general terms, we may consider the deep structure of the emergent sovereignty frame along two dimensions.¹³ In the first place, and most fundamentally, there is an *epistemic* shift. Sovereignty in its mature form consists of a new “social imaginary”¹⁴ – a novel way of knowing and ordering the world that “silently frames the

¹² On the self-conscious linkage of internal and external sovereignty in the making of the United States, see D. Armitage, *The Declaration of Independence: A Global History* (Cambridge: Harvard University Press, 2007).

¹³ See N. Walker “The Variety of Sovereignty” in *Sovereignty Games* n3 above, 21-32; see also N. Walker “Introduction” in *Relocating Sovereignty* n4 above, xi-xxi.

¹⁴ C. Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

conduct of much of modern politics.”¹⁵ Sovereignty’s mature frame is first and foremost a presuppositional frame that shapes perception, understanding and, in turn, practical reason. It involves the constructive assumption of an ultimately authoritative “unity (out) of a manifold”¹⁶ It is a representational and ordering device which envisages and identifies discrete polities that can act in the name of an undifferentiated collective notwithstanding an internal diversity of interests, values and wills. Importantly, as Martin Loughlin has argued,¹⁷ in this deep framing sense sovereignty is conceptually prior both to positive law, including constitutional law, and to the governmental and wider political system, and does not necessarily privilege either. Like politics, law, or at least the domain of public law,¹⁸ is predicated upon sovereignty. The security of law’s commitments, its construction of a bounded order, its durability and its expansive capacity for reflexive self-reproduction, are all dependent on the axiomatic frame of sovereign power.

Secondly, the mature age of sovereignty also involves a *systemic* shift. International relations theorists tend to talk in the language of ‘system’ – as in the ‘system of states’ or the ‘Westphalian system’.¹⁹ The template of mature sovereignty, with its symbiotically related

¹⁵ Jackson, n8 above, 431.

¹⁶ H. Lindahl “Sovereignty and Symbolization” (1997) 28 *Rechtstheorie* 347-371, 348.

¹⁷ See e.g. M. Loughlin “In Defence of *Staatslehre*” (2009) 48 *Der Staat* 1-28. See also Loughlin, *Foundations of Public Law* n9 above.

¹⁸ For discussion of alternative historical frames for the modern legal universe (in whole or in part), in particular the fluid tradition of ‘common law(s)’, see P. Glenn *On Common Laws* (Oxford: OUP, 2005). See also N. Walker “On the Necessary Publicness of Law” in C. Michelon, G. Clunie, C. McCorkindale and H. Psarras (eds) *The Public in Law* (Aldershot: Ashgate, 2012) 7-33

¹⁹ See e.g. R. Jackson, n8 above.

internal and external aspects, presupposes and requires a general type rather than a unique instance. It imagines a world of sovereign states, mutually recognizing, mutually supportive and mutually exclusive in their claims to the plenitude of internal authority. That is to say, mature sovereignty can only be understood in a systemic context, sustained through a path-dependent and self-reproductive cycle of formally identical polities operating according to certain uniform norms of engagement.

Of course, the ‘real world’ is much different from this idealized world of international law and relations, and always has been. The sovereign system in the high modern age was a partial and precarious accomplishment, denied to many conquered or aspiring peoples in the name of empire or the self-interest of the already self-chosen, and more generally vulnerable to state aggression in a global system then as now lacking any central monopoly of legitimate violence. Yet, the systemic dimension obtained sufficient purchase – enough of a ‘framing effect’ – to provide a powerful and sustained logic of reproduction in global political relations.

3. The Sovereignty Claim

Jean Bodin famously spoke of the “marks of sovereignty”²⁰ to convey the idea that modern sovereignty in its abstract and encompassing sense possesses no singular phenomenal form, but instead is made visible or perceptible to us through its diverse manifestations. The construction of a unity out of the manifold that is so vital to the deep epistemic frame of sovereignty is and cannot but be an artificial unity, one which is only empirically observed and reconstituted

²⁰ J. Bodin, *The Six Books of a Commonweale* [1576: Richard Knolles trans. 1606] (Cambridge, Harvard University Press, 1962) Book1, Chapter 10.

through “scattered signs.”²¹ These marks and signs are not self-evident or self-selecting. They are a matter of active construction and reception, and beneath, before and after that construction and reception may lie speculation and disagreement, struggle and contention, endorsement and rejection of any particular site and image of sovereign power.

The invocation of sovereignty, in other words, involves a “speech act”²² possessing not only locutionary and illocutionary force but also perlocutionary force. That is to say, sovereignty claims are not merely utterances conveying a set meaning, but have real and variable effects on social and political practice through persuading, threatening, enlightening, inspiring or otherwise shaping behaviour or expectations. These effects are inseparable from the history of a particular set of sovereign arrangements and the constellation of meaning associated with that history. The British idea of the Queen-in-Parliament, the historical French attachment to the dual notions of national sovereignty and popular sovereignty, and the importance of the residual ‘sovereign’ powers of the states as consecrated in the 10th Amendment of the American Constitution, for example, all refer to quite different marks of sovereignty which only make sense in their own particular context. Yet each speaks to the distribution of the same underlying unity of sovereign power, and each shows sovereignty at the symbolic level to be of a deeply ideological character - a vehicle through which meaning is constructed to shape and allocate power.

In expressive terms, therefore, sovereignty is a ‘virtual’ category, one that has no phenomenal presence in its capacious entirety and so must always and can only manifest itself through

²¹ D. Baranger, “The Apparition of Sovereignty” in Kalmo and Skinner (eds) n5 above 47-63, 53.

²² W.G. Werner and J. H. De Wilde “The Endurance of Sovereignty” (2001) 7 *European Journal of International Relations* 283-313, 287.

iterative and more-or-less creative symbolic acts of *representation*.²³ This symbolic work, sometimes speculative or contentious in its claims, may involve either, in the one direction, specification of the detailed framework of operationalization and application of sovereignty; or, in the other direction, the identification of its source or pedigree. That is to say, it may involve, in the former more concrete vein, claims to the rightful possession or appropriate articulation of some or all aspects of the sovereign power on behalf of particular institutional forms or regulatory complexes – legislative, executive or judicial organs or some combination of these, federated levels of government, constitutive instruments etc. Or it may involve, in the latter more abstract vein, the “imputation” of the ‘true’ seat or source of sovereign power to other ‘virtual’ entities themselves capable of being made apparent only through representation, such as ‘the people’ or ‘the nation.’²⁴

It is unsurprising that sovereignty in its expressive dimension is used to such various and open-ended effect. Its wide range of reference is not just the obverse, but also the price of its underlying unity, and a reflection of the importance of the ideological stakes involved. According to the prominent French constitutional scholar Carré de Malberg, moreover, the unwieldy range of the sovereignty term, and the consequent danger of conceptual confusion, is exacerbated by the lack of sufficient discrimination in our natural language.²⁵ And what is the case for French also applies in English. Unlike the German language, for example, both French and English use the ‘s’ word to refer not only to the supreme ordering power in the deep framing

²³ See, Lindahl note 16 above.

²⁴ See e.g. M. Troper “The Survival of Sovereignty” in Kalmo and Skinner (eds) n5 above, 132-150, 147.

²⁵ Paris: Dalloz, 2 Vols, 2004) Vol. 1 79.

sense considered above – which is the only meaning of *Souveranitat* in German - but, in addition, to both the entire range of powers embraced within the state's authority (*Staatsgewalt*) and the power of the highest organ of state authority (*Herrschaft*).

We should not, however, overstate the indeterminacy of the claim-language of sovereignty. It is far from true that 'anything goes' in the bidding war over what counts as a sovereignty mark. Claims to sovereignty are more or less compelling and their persuasiveness depends, amongst other things, upon the embedded familiarity of their invocation in their immediate symbolic context, or the persuasiveness of their asserted or implied resemblance to or analogy with other contexts of use, as well as the plausibility of their corroboration of existing architectures of authority. For example, one standard version of "foundational constitutionalism"²⁶ typically invokes sovereignty as a recurrent link in an extended chain of authority. Sovereignty may, as in the American version of the foundational constitutional story, appear in one and the same narrative in various guises and iterations - as the collective will and constituent power of the people or nation, as the spirit animating and authorizing the basic form of a written constitution, as a quality imbuing some of the organs named in the written constitution, and as a remainder or residual power left to other constitutional actors. Other constitutional heritages possess their own variations on this conventional symbolical wisdom,²⁷ but in all cases the marks of sovereignty tend to fit together in patterns whose intelligibility and acceptability turns on their clear

²⁶ See e.g. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP, 2010) ch.2.

²⁷ For discussion of the main modern constitutional traditions, including their use of sovereignty discourse, see M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (New York, Routledge, 2009)

resonance with a dominant narrative of political authority current in that polity or more generally.

4. Sovereignty in a post-Westphalian Age

If the high modern world emphasized 'sovereign' comprehensiveness of authority, universality of form and mutual exclusivity of claims, our late modern world in which the continuing adequacy of sovereignty as a framing and claiming device stands to be assessed looks quite different. While the state remains the focus of political organization - and its continuing prominence is one reason why talk of a return to a medieval configuration is inaccurate - the state is now merely first amongst equals. In place of a universal and uniform template of sovereign statehood we have a highly differentiated European and, indeed, global "mosaic"²⁸ of legal and political capacities. In place of internal sovereignty as comprehensive and monopolistic, authority is typically partial – distributed between various political sites and levels, states and otherwise. And in place of mutual exclusivity as the default condition of external sovereignty, we have overlap, interlock and mutual interference.

How so? No single factor explains the gradual and continuing movement from universality, comprehensiveness and mutual exclusivity to differentiation, partiality and overlap. Rather, there is a combination and accumulation of forces. Some tendencies challenge states and their borders as effective containers of power. The long post-Second World War development of transnational markets, communication media and cultural forms gradually eroded the material capacity of the nation state as the axis of economic power and political authority, and, to a lesser

²⁸ See e.g., N. Walker, J. Shaw and S. Tierney (eds) *Europe's Constitutional Mosaic* (Oxford: Hart, 2011). For discussion of sovereign-like forms in the wider global mosaic, see e.g. J.L. Dunoff and J. Trachman (eds) *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge, CUP, 2009).

extent, its symbolic locus as the core of political identity. Institutional responses to these changes underscored the state-decentring trend. Globally inclusive entities such as the United Nations and exclusive groupings such as the G8, as well as regional institutions like the EU, both tracked and reinforced the development of forms of collective action and public goods (and 'bads') beyond the state. Their remit ranges far and wide, from the provision of security to the protection of human rights, and from the making of transnational markets to market-'correction' in spheres as diverse as food safety, environmental protection, energy efficiency and criminal justice co-operation. Overlapping these umbrella institutions there is a dense network of powerful, functionally specialist transnational organizations, from state-controlled public bodies such as the World Trade Organisation and the International Atomic Energy Agency, through hybrid public/private entities such as the Internet Corporation for Assigned Names and Numbers, to purely non-state organs such as the International Olympic Committee.²⁹ To repeat, none of these changes implies that the sovereign state is redundant. They simply generate new and supplementary tiers of transnationally connected legal and political authority, in so doing challenging the generality of the framework of state authority. Particular states retain considerable power, though, tellingly, these tend to be of a size or regional prominence – whether the United States or newly emergent regional powers such as Brazil, Russia, India and China – that allows them to operate on the same global scale as many of the new transnational entities.

²⁹ For discussion, see for example N. Walker "Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms" (2012) 3 *Transnational Legal Theory* 61-86.

But the challenge to state sovereignty is not simply a matter of the emergence of a higher scale of authority. Alongside these global and transnational tendencies, other disturbances to the sovereignty of the state emanate from below.³⁰ Ironically, the seeds of this challenge to the modern system were sown in the foundational American settlement of 1789. As well as the first constitutionally baptized modern state, the United States was also the first mature federation. It gave novel constitutional form to the idea of territorially distributed power *within* the polity. However, it did so in a way which - even if it required a Civil War to settle the matter definitively - understood the allocation of jurisdiction between federal government and provincial or 'state' institutions as an expression of the sovereign authority of the United States as an integrated whole rather than as a challenge to the very idea of a sovereign frame.³¹

Federalism US-style was designed and rolled out in a particular way, involving a clear division between the two levels of authority and their respective policy spheres, a high degree of ethnic or cultural homogeneity between the different state units, and uniform and symmetrical legal and institutional treatment of these units. Contemporary federalism, or quasi-federalism, has gradually diverged from that classical norm. Most newer federations, such as Germany, are 'co-operative' rather than 'dual' arrangements, involving a significant degree of policy overlap and institutional interlocking between central and local levels. Many, such as Canada, Spain or Belgium, with our own "Union State"³² as an untidy outlier even of this sub-category of quasi-

³⁰ See e.g. S. Tierney "Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State" (2005) 54 *International and Comparative Legal Quarterly* 161-83.

³¹ On the relationship between a fragmented notion of internal sovereignty and a unitary notion of external sovereignty in the United States, see R. Keohane, "Ironies of Sovereignty: The European Union and the United States" (2002) 40 *Journal of Common Market Studies* 743-65.

³² See S. Rokkan and D. Urwin *The Politics of Territorial Identity: Studies in European Regionalism* (London: Sage, 1982).

federations, are also multinational or multiethnic rather than merely territorial compacts, with some constituencies retaining aspirations towards stronger forms of constitutional recognition. And such multinational or multiethnic federations tend, in addition, towards uneven or asymmetrical treatment of their provinces; those with the clearest or most longstanding traditions of distinctiveness, or the strongest claim to national identity, are accorded more ample recognition of cultural goods such as language or religion, greater regional governmental autonomy, or disproportionate influence at the federal centre. All these factors combine to create a looser and more fluid political form, challenging the earlier conception of the federal state as a mere variation of the sovereigntist ideal of a well ordered and permanently settled unity.³³

So when considering the overall challenge to the universality, comprehensiveness and mutual exclusivity of the modern system of modern states and its sovereigntist frame, we must look to both flanks - to pressures from the substate interior as well as from the transnational beyond. Furthermore, the two dynamics feed off one another. Claims to substate national recognition or protection are powerfully sponsored through global and regional mechanisms for the promotion of individual or collective rights, while supranational institutions such as the EU provide a scale of policy and economic support which makes the ambition of greater regional autonomy within existing states more viable. By the same token, just because existing states have gradually ceded authority and capacity upwards to other territorial or functional institutions, they may become less attractive magnets for substate nations and less well equipped to maintain their sovereign integrity.³⁴

³³ See e.g. S. Choudry (ed) *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: OUP, 2008)

³⁴ See e.g. Tierney n30 above; see more generally S. Tierney *Constitutional Law and National Pluralism* (Oxford: OUP, 2006); M. Keating *Stateless Nations: Plurinational Democracy in a Post-Sovereignty Era* (Oxford: OUP, 2004).

In all of this, it is evident how the challenge to the high modern paradigm of sovereignty gathers pace. The development of new and unfamiliar forms and sites of authority alongside and often interlocking with the state means that the expressive language of sovereignty is no longer so clearly suited to the 'marks' of our global institutional architecture, many parts of which bear only a tenuous relationship to anything resembling a unitary polity. Systemically too, these new forms and combinations of authority disturb the self-reproductive cycle of sovereign mutual exclusion and recognition. And the fundamental question whether the sovereigntist world-view, with its predilection to picture legal authority as a plurality of unities, is even epistemically adequate to the task of providing a basic grid for the changing world order, is posed ever more insistently and challengingly.

In earlier work, I sought to address and answer this challenge by resort to the idea of "late sovereignty."³⁵ Late sovereignty is still sovereignty and so remains connected to the modernist paradigm to the extent that sovereignty language and its associated ideas of ultimate authority continue to be used across existing states, and indeed, are increasingly endorsed across other non-state sites of political or legal community, whether in sub-national contexts or in supranational or transnational contexts such as the EU or the WTO. Yet late sovereignty is both a distinctive and, probably, an irreversible phase in the history of modern sovereignty. It is distinctive in the sense that the claim to authority as flowing from and through some underlying unity is no longer combined with the notion that it need be monopolistic within the territorial boundaries of the polity. Rather, what we observe, for example, in the relations of the EU to its

³⁵ N. Walker "Late Sovereignty in the European Union" in Walker (ed) n6 above 3-32. For a recent refinement and application, See C. MacAmhlaigh, "Late Sovereignty in post-integration Europe: Continuity and change in a constitutive concept" in R. Adler-Nissen and U. Grad (eds) *European Integration and Postcolonial Sovereignty Games: The EU overseas countries and territories* (London, Routledge, 2013)

member states, each of which makes sovereigntist or supremacy-based claims in respect of the other,³⁶ is an emerging sense of “autonomy without territorial exclusivity”.³⁷ In turn, this break in the connection between ultimate authority and exclusivity of authority undermines the systemic conservatism of the older matrix. If the power of any and each sovereign entity is no longer conditioned by an attitude of mutual forbearance and recognition on the part of all such entities, then, in a self-reinforcing fashion, the system as a whole becomes less resistant against new claims and new mutations of sovereignty. This structural shift is reflected and reinforced at the level of the sociology of political power. Non-state political forms may have been the creation of sovereign states, but over time they become much more than the sum of their antecedents and may transcend the conditions of their formation. Particular non-state polities may come and go – in 2013 we can no longer even be sure that the world’s most advanced non-state polity, the EU, will survive in recognizable form. Yet given the continuing economic, technological, cultural and institutional forces of transnationalism, and given continuing indication of the pliability of the sovereign form, the possibility of rewinding to an age of high modernity in which no non-state juridical entity challenges the exclusive authority of the state seems remote.

But if the logic of sovereignty is no longer one of conservative reproduction but of variable reiteration, will we not in time arrive at a tipping point where sovereignty loses its grip as a plausible way of imagining and adjusting our global political arrangements? Will we not reach a stage where states are so qualified and compromised in their internal and external normative authority, yet non-state entities are so deficient or otherwise unfamiliar in terms of our

³⁶ See e.g. M. Claes, *The National Courts’ Mandate in the European Constitution* (Oxford: Hart, 2006)

³⁷ Walker, n35 above, 23. See also the chapter by Chalmers in this volume.

conventional template of the sovereign polity, that sovereignty no longer serves as a viable frame for the whole? Even to pose the question raises three related imponderables, and it is our inability to resolve these imponderables which should makes us unwilling to 'wish away' our sovereigntist frame.

A first imponderable is starkly empirical. We cannot predict the course of global history, and so cannot tell whether the trend away from the state system may nevertheless re-stabilize in a new equilibrium. Secondly, for the same reason we cannot predict or control for the degree of latent flexibility in the language and presuppositions of sovereignty. Thirdly, we cannot easily answer the relevant counterfactual question; namely, if there is a sovereignty-shaped hole emerging in our understanding of the legal and political universe, how do we begin to conceive of an alternative matrix of political agency? For sovereignty will not fade and become irrelevant in a conceptual vacuum, but only to the extent that such an alternative emerges and 'catches on'. Yet precisely because we still tend to think, however implicitly, within a sovereigntist frame and perspective, we lack the means to assess how likely the emergence of such an alternative paradigm might be or what shape it might take.

But what of those, such as Neil MacCormick, who have nevertheless confidently hailed the end of sovereignty?³⁸ It is surely instructive that in so doing they have tended to concentrate on surfaces rather than depths, institutional appearances rather than formative premises, claims rather than frames. It is undeniable, and well-illustrated by MacCormick, that governmental power, whether in federations, or in our own Union state, or at supranational sites, or in international contexts, tends to be divided, pooled, shared or otherwise redistributed in ever more

³⁸ See e.g. MacCormick n1 above. For a more qualified later view, see his "Sovereignty and After" in Kalmo and Skinner (eds) n5 above 151-168; see also Keating, n34 above.

novel and manifold ways. But the logic of modern sovereignty has always depended upon the contrast and facilitative relationship between underlying unity of form and diversity of application, and indeed the energy of modern sovereign power lies in the versatile and renewable capacity of the former to prompt and contain the latter. It simply begs the question, therefore, to point to an unprecedented pattern of institutional diversity as evidence of sovereignty's broken unity.

5. The Changing UK Context: Parliamentary Sovereignty and its Reductions

As later essays in this volume make abundantly clear,³⁹ discussion of sovereignty in the British context continues to be dominated by the doctrine of Parliamentary sovereignty.⁴⁰ It naturally follows that contemporary British debate over the challenge to sovereignty in general should also focus on the ways in which Parliamentary sovereignty in particular has recently been subjected to new threats, provocations and qualifications. The questioning of Parliamentary sovereignty, which in its canonical Diceyan version holds that Parliament can make and unmake any law and that no other body can override or set aside its legislation, has come from quite different corners of the legal universe.⁴¹ The integrity of the doctrine is challenged from the perspective of European Union law and its own self-understanding as a supreme and self-contained legal order. It is interrogated through the prism of the Human Rights Act 1998 and, in particular, its strong section 3(1) direction to interpret statute in conformity with the rights contained in the European Convention on Human Rights. It is also queried from the standpoint of

³⁹ See especially the contributions from Goldsworthy, Young and Hope.

⁴⁰ See, e.g., the classic studies of J Goldsworthy; *The Sovereignty of Parliament: History and Philosophy* (Oxford, OUP, 1999); *Parliamentary Sovereignty: Contemporary Debates* (Cambridge, CUP, 2010).

⁴¹ For a good overview, see A. W. Bradley "The Sovereignty of Parliament: Form or Substance?" (Oxford: OUP, 2011, 7th edition) 35-69.

the UK's constituent nations – for a long time Ireland and, more recently, Scotland, with Wales some way behind - and their claim, buttressed by the recent growth of devolved systems of government, to possess or develop their own seat of sovereign authority.⁴²

Closely bound up with these challenges, a more general scepticism towards the Parliamentary sovereignty doctrine as an unqualified attribution of power to the institutional complex of the Queen-in-Parliament has recently gained a firm foothold within both academic and judicial circles. We are advised from a position of “common law constitutionalism”⁴³ - or, perhaps more accurately, “common law radicalism”⁴⁴ - that the role of the courts in providing the last legal word on the meaning of the constitution is no mere institutional inference. It is not simply that, as the branch of government concerned with interpretation and application in disputed instances, they have an unavoidable voice in the recognition and mobilization of our constitutional fundamentals, and in using that voice should do no more than passively acknowledge and register the political fact of Parliamentary sovereignty. Rather, the enduring involvement of the courts is deemed to have a more profound significance. It indicates that Parliamentary sovereignty is itself a dual or “bi-polar”⁴⁵ principle, or a common law rule of a

⁴² See e.g. MacCormick n1 above, chs 11 and 12; M. Keating, *The Independence of Scotland* (Oxford: OUP, 2009). The continuing power of the sovereignty metaphor is vividly demonstrated by the tone and content of the Scottish Government's recent document setting out its timetable for constitutional change in view of the referendum on independence intended for the autumn of 2014. In a double-spaced document of a mere 16 pages there are no fewer than nine references to the Scottish people as ‘sovereign’ or as possessing a claim to ‘sovereignty’; see *Scotland's Future; from the Referendum to Independence and a Written Constitution* (Scottish Government: February 2013)

⁴³ See e.g. T.R.S. Allan “In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law” (2009) 22 *Cambridge Law Journal* 187 - 203

⁴⁴ See e.g. C Turpin and A Tomkins, *British Government and the Constitution* (Cambridge: Cambridge University Press, 6th ed 2007) 66.

⁴⁵ S. Sedley “Human Rights: A Twenty –First Century Agenda [1995] *Public Law* 386, 389.

kind that is open to refinement or qualification by the judges. In turn, this power of qualification, as has been suggested in a number of recent cases,⁴⁶ may enable, indeed oblige, the judges to impose certain substantive constraints in the name of the Rule of Law or a more general attachment to a principled rather than a policy-based foundation for legal rules.⁴⁷ In this broader movement, the challenge to a Westminster-centred concentration of power from Brussels, from Strasbourg and from the Celtic nations is understood both as an opportunity and as a reason to rethink an old doctrine for new times.

How does this distinctive developmental track fit with our general understanding of sovereignty as providing a dual significance in legal thought – as concerned both with framing and with claiming? Most strikingly, what we observe in the British context, through the telescoping of the sovereignty debate onto the institutional complex of the Queen-in-Parliament, is a tendency to elide or blur the very distinction between the underlying frame and the sovereign mark which I have sought to emphasize. In a nutshell, Parliamentary sovereignty tends to be approached less as a sign of sovereignty than as the thing itself. Let me conclude by suggesting why and how this tendency occurs, and outlining some of its consequences.

This is not the place to rehearse the history of Parliament and its struggle with the Crown, and how this struggle was won over the course of the 17th century and consolidated in the 18th century.⁴⁸ It suffices to say that the early success of Parliamentary sovereignty, at a point where the full conceptual apparatus of modern constitutionalism was not yet in place, shaped and constrained the way in which ideas of ultimate authority could be imagined and pursued within

⁴⁶ See in particular, *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 (HL) (Lord Bingham and Lord Hoffmann); *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (Lord Steyn and Lord Hope of Craighead); *AXA General Insurance v Lord Advocate* [2011] UKSC 46 (Lord Hope of Craighead and Lord Reed).

⁴⁷ See e.g. Allan, n43 above.

⁴⁸ See e.g. Loughlin, n9 above, ch.9; A. Tomkins, *Our Republican Constitution* (Oxford: Hart, 2005) ch.3.

the British polity. If we recall the history of sovereignty as one of progressive abstraction from the personal, dynastic and singular to the impersonal, corporate and internally differentiated, the idea of Parliamentary sovereignty occupies a midpoint on this continuum. Only with the development of foundational constitutional settlements in the late 18th century was the distinction between sovereignty in general - now seen as an attribute of 'the people' as constituent power - and its particular institutional manifestations and applications fully developed and clarified in political theory and symbology. The English and later the British state was in this regard a case of arrested development. The part became the whole, the surrogate the original, the application the source.

Other ideas of sovereignty did of course emerge or were preserved alongside Parliamentary sovereignty, both in terms of pedigree and institutionalization. On the one hand, in terms of pedigree, an alternative and in some measure complementary tradition of popular sovereignty grew and persisted alongside parliamentary sovereignty⁴⁹ without ever receiving the endorsement of a constitutional moment of self-founding or otherwise achieving widespread recognition as the dominant source of constitutional legitimacy. On the other hand, in terms of institutionalization – and indeed providing one of the counterpoints to the idea of popular sovereignty - even after the struggles of the 17th century the Crown retained a residual final authority apart from Parliament. This was particularly evident in the persistence of prerogative powers, but also as one dimension of the resilient authority of the courts and, perhaps, one remote form of corroboration of the contemporary revival of the judicial claim to co-

⁴⁹ See e.g. Tomkins, n48 above.

sovereignty.⁵⁰ Yet throughout, Parliament continued to provide the magnetic centre of the constitutional order, its assertion of sovereignty supplying the symbolic and authoritative point of reference and limiting condition for other claims, both innovatory and renovatory.

This narrow vision of sovereignty supplied many advantages of institutional unity, and in time, of democratic focus. Indeed, much of the force of the contemporary case for the United Kingdom as a distinctively "political constitution",⁵¹ as one more responsive to the will of the legislature than to the reason of doctrine, depends on that vision of sovereignty. But narrowness of outlook and concentration of institutional authority also has a downside, not least its failure to unpack sovereignty into a fuller constitutional vision. In particular, the 'single mark' of Parliamentary sovereignty has always occupied the space and pre-empted the adoption of just that constitutional framework of higher law which would allow a popular designation and broaden distribution of the marks of sovereignty. Instead, concentrated in the single institutional complex of the Queen-in-Parliament, the domain of sovereignty becomes a congested zone. This has a number of challenging consequences. From its narrow point of ultimate authority Parliamentary sovereignty tends to be conceptually overburdened as our constitutional lodestar, to be competed over as a prize rather than treated as a common resource of constitutional authority, and to invite a backward-looking rather than a forward-looking approach to constitutional construction and justification. Let us briefly examine each of these related tendencies.

First there is the question of conceptual overload. There are many examples of the reductive and distorting effect of too narrow a focus on Parliamentary sovereignty. Take, for

⁵⁰ On the resilience of the Crown in British constitutional law generally, see M. Sunkin and S. Payne (eds) *The Nature of the Crown: a legal and political analysis* (Oxford: OUP, 1999)

⁵¹ For an astute overview of political constitutionalism, and its relationship to so-called 'legal constitutionalism', see G. Gee and G.C. Webber "What is a Political Constitution?" (2010) 30 *Oxford Journal of Legal Studies* 273-299.

instance, the matter of statutory interpretation. Until recent years, the idea that the first and only responsibility of the Courts was to give effect to the intention of Parliament had the effect of chilling meaningful discussion of the nature and purpose of the judicial role in areas where statute offered insufficient guidance or might even be absent – notably in human rights cases and in judicial review of administrative action. Indeed, some of the early success of a common law constitutionalist approach is owed to its candid approach to the insufficiency of existing protocols of judicial interpretation and the inordinate weight these placed on the narrow principle of Parliamentary sovereignty.⁵²

Or take, for example, the question of Britain's relationship with the European Union. In most constitutional orders, internal sovereignty - the location of ultimate authority within the polity - and external sovereignty - the authority of the polity as a whole in relation to the rest of the world - are clearly concerned with distinct aspects. This is often reflected in a written Constitution, where different provisions will deal with the internal allocation of authority amongst the branches and levels of government on the one hand, and external relations on the other, including the place of international law, supranational law or other forms of foreign law vis-à-vis domestic law in the hierarchy of sources of law-making.⁵³ In the British case, however, there is no such clear distinction between internal and external sovereignty and their limits, at least as regards legislative authority.⁵⁴ Accordingly, the question of the standing of European

⁵² For an enduringly excellent statement of the legal and political circumstances of the early growth of common law constitutionalism, see M. Hunt *Using Human Rights Law in English Courts* (Oxford: Hart, 1997).

⁵³ See e.g. Claes n36 above

⁵⁴ Of course, external sovereignty also refers, more positively, to the continuing right of the executive to participate in international relations and to make international agreements on behalf of the UK in those areas where such a right has not already been curtailed or qualified (by the operation of Parliamentary sovereignty). In that respect, external sovereignty continues to be treated quite apart from the doctrine of Parliamentary sovereignty.

Union law, which by encroaching on many areas of domestic authority curtails the international legal sovereignty of the United Kingdom, is treated in the same perspective, and as part of the same stream of constitutional reasoning and judicial authority, as any internal challenge to the sovereign location of power from the perspective, say, of human rights or the devolution of power.⁵⁵ Parliamentary sovereignty is treated as a single reference point and conceptual prism for internal and external relations alike, even though the stakes are quite different – the proper distribution and self-imposed limits of internal legislative authority on the one hand, and the balance of UK authority with Europe and the world on the other. Again, the reduction of the whole to the part, the idea to one of its manifestations, has a cramping effect on constitutional language and thought. Parliamentary sovereignty is in danger of having to explain and justify too much and to collapse different questions into a single answer.

Secondly, there is the prize-fighting dimension. If sovereignty in the British constitution exists only or predominantly through its Parliamentary mark, then the key to constitutional authority and the realization of any particular vision of the constitutional good lies in control of the meaning or operationalization of that mark. The reason why disagreements between different conceptions of the nature and reach of Parliamentary sovereignty are so hotly contested between political and legal, legislative and judicial, Parliament-centred and common-law-centred, therefore, is that these disagreements concern occupation of the narrow access route to the commanding heights of our unwritten constitutional system. What is more, there is a self-reinforcing intractability to the debate. As there is no Archimedean point beyond Parliamentary sovereignty where the debate over the meaning of Parliamentary sovereignty can be definitively

⁵⁵ See e.g. *R v Secretary of State for Transport, ex parte Factortame (No 1)* [1990] 2 AC 85; *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603; *Thoburn v Sunderland City Council* [2003] QB 151; read alongside the (non EU-related) cases cited at note 46 above.

resolved, the contest threatens to become perpetual.⁵⁶ And as some parties, the various institutional parties in particular, who argue for this or that understanding of Parliamentary sovereignty have both an authoritative presence in the negotiation and a significant stake in the outcome – that is to say, they are seeking to declare the rules of the very game in which they are active players - this further militates against settlement.

In turn, this is connected to a third limiting tendency associated with the centrality of Parliamentary sovereignty. The focus on the past and its struggles rather than the future that is so characteristic of 'our leading narratives' of constitutionalism also stems from the difficulty of thinking or acting beyond Parliamentary supremacy as the apex of authority. Just as there is no likelihood of easy resolution of disputes over the provenance, status, meaning and extent of Parliamentary sovereignty, so too the resilience of the doctrine militates against the adoption of the kind of written constitutional prospectus enjoyed by virtually all other states. There is little political will to depart from a framework which has become so embedded within our political heritage and which, in its open-ended empowerment of the government of the day, suits the beliefs and the interests of the key actors on whom any initiative to change would depend. Nor, especially in an age where the territorial integrity of the polity is under challenge from nationalist quarters, would the prospects be promising of a successful conclusion if any broader project of refounding and resettlement were to be attempted.⁵⁷

⁵⁶ For a typical recent example of such contestation, see the articles by Richard Bellamy, Paul Craig, Christopher Forsyth, Nick Barber, Trevor Allan and Alison Young on the prospects or otherwise of Parliamentary sovereignty and the relative merits and robustness of the 'political' and 'legal' dimensions of British constitutionalism in a special 'Symposium on the changing landscape of British constitutionalism' in *International Journal of Constitutional Law* (2011) 9(1) 86-171.

⁵⁷ On the difficulties associated with fundamental constitutional reform in the UK, and on some recently suggested surrogate proposals, see A. McHarg "Reforming the United Kingdom Constitution: Law, Convention, Soft Law" (2008) 71 *Modern Law Review* 853-877.

The absence of a viable alternative horizon inevitably redirects our constitutional visionaries and engineers backwards. If there can be no constitutional resource to draw upon in determining and finessing the ground-rules for steering constitutional adjustment and reform other than the resource we already possess, then that resource has to be mined exhaustively for the nuggets of meaning and practice which support our preferred reading. Ironically, therefore, despite its very different origins and centre of institutional gravity, and despite its much more permissive consequences in terms of legislative policy, the root idea of Parliamentary sovereignty, with its venerable standing and self-reproductive tendencies, ends up performing the same kind of symbolic function as some of the older written Constitutions, most notably the United States Constitution. Over time, its foundational precepts, just like their foundational texts, come to assume an almost sacred quality and so to supply a non-negotiable point of departure for anyone who wants to be taken seriously in the constitutional conversation.

It is certainly the case, we may conclude, that the sovereignty frame is still entrenched within the deep structure of British constitutionalism, even for those who might be critical about its scope or absolute quality. Yet the reduction of that frame to the particular and partial claim of Parliamentary sovereignty adds a peculiar texture to our constitutional debate. Sovereignty does indeed remain very much 'in perspective' in the United Kingdom today, but it is often through a rather narrow focus.